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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

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Deer Flat Wildlife Refuge Claims
Consolidated Subcase No. 02-10063

MEMORANDUM DECISION GRANTING
STATE OF IDAHO'S MOTION FOR
SUMMARY JUDGMENT

Memorandum decision following cross motions for summary judgment. The State of Idaho and the Coalition of Objectors' *Motion* is **granted**, the United States' *Motion* is **denied**. United States claims are **dismissed**.

ATTORNEYS

Jim Dubois	<i>Counsel for the United States</i>
Clive Strong	<i>Counsel for the State of Idaho</i>
Roger Ling	<i>Counsel for the Objectors</i>
Scott Campbell	<i>Counsel for the Objectors</i>

These subcases were consolidated to determine whether the United States is entitled to a federal reserved water right for the Deer Flat National Wildlife Refuge.

I.
PROCEDURAL HISTORY

The United States, on behalf of the Fish and Wildlife Service, the State of Idaho, and the "Coalition" of Objectors (Objectors), all filed *Motions for Summary Judgment*. For the purposes of these motions, all participating parties are aligned in opposition to the United States. Responses and

Replies were filed by all parties in opposition to the respective cross motions for summary judgment followed by oral argument and the filing of supplemental briefs at the court's request. The issue before the court is:

Whether the United States is entitled to a federal reserved water right for the Deer Flat National Wildlife Refuge.

II. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well established:

In summary judgment proceedings the facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. Summary Judgment must be granted if the court determines that the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Strongman v. Idaho Potato Comm'n, 129 Idaho 766, 771, 932 P.2d 889, 894 (1997) (quoting I.R.C.P. 56(c)). Where the record supports conflicting inferences, or reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* at 771. Presenting no questions of fact, the issue before the court is solely one of law requiring the interpretation of several executive orders and United States statutes.

III. FEDERAL RESERVED WATER RIGHTS

A state has plenary control of water located within its territory. *Kansas v. Colorado*, 206 U.S. 46 (1907). A claim to a federal reserved water right is an exception to a state's plenary control of water. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899). Reserved water rights may be express or implied. *United States v. New Mexico*, 438 U.S. 696 (1978). An express reservation of water is created by the explicit language in the act creating the reservation.

Id. An implied reserved water right must be based on a reservation of land, *Arizona v. California*, 373 U.S. 546 (1963), and may be granted if the following three criteria are satisfied:

- (1) An implied reservation of water exists only if necessary to fulfill the primary, not the secondary, purpose for which the reservation of land was created, *United States v. New Mexico*, 438 U.S. at 702;
- (2) Without water, the purposes of the reservation must entirely be defeated, *Id.*; and
- (3) The water claimed must be the minimum amount necessary to achieve the purposes of the reservation, *Id.* at 700.

The United States is not claiming a right to an express reservation of water, but rather that a federal reserved water right must be implied to fulfill the purposes of the Deer Flat National Wildlife Refuge. Therefore, the reserving executive orders and the enabling legislation must be interpreted to resolve the cross motions for summary judgment.

A. THE DEER FLAT NATIONAL WILDLIFE REFUGE CONSISTS OF THE FORMER "SNAKE RIVER NATIONAL WILDLIFE REFUGE" AND THE ORIGINAL "DEER FLAT NATIONAL WILDLIFE REFUGE" AND REMAINS RESERVED FOR THE PURPOSES OF BOTH ORIGINAL RESERVATIONS.

The Deer Flat National Wildlife Refuge was established by P.L.O. No. 3110, 28 Fed. Reg. 6874 (1963). Public Land Order 3110 consolidated the "Snake River National Wildlife Refuge," Exec. Order No. 7691, 2 Fed. Reg. 1422 (1937), with the "Deer Flat National Wildlife Refuge," Exec. Order No. 7655, 2 Fed. Reg. 1453 (1937).¹ Analysis of any claim to a federal reserved water right requires scrutiny of the "purposes" for which a federal reservation of land is established. The first step is to determine the effect of Public Land Order 3110, that is, whether Public Land

¹ Several other Public Land Orders including Public Land Order No. 3016, 28 Fed. Reg. 3658 (1963), corrected by Public Land Order No. 3098, 28 Fed. Reg. 5618 (1963), Public Land Order No. 4425, 33 Fed. Reg. 8275 (1968), altered the precise geographic scope of the "Deer Flat National Wildlife Refuge" and Proclamation No. 2416 issued on July 25, 1940 substituted "Wildlife" for "Waterfowl" in the names of both the refuges. The precise geographic scope of the refuge and even the name of the refuges at any given time is of no benefit in the analysis of whether the primary purpose of the "Deer Flat National Wildlife Refuge" requires an implied federal reserved water right.

Order 3110 abolished any of the purposes for which the "Snake River National Wildlife Refuge" or the "Deer Flat National Wildlife Refuge" was reserved from the public domain.

Public Land Order 3110 states, in pertinent part:

The Snake River National Wildlife Refuge, heretofore established by Executive Order No. 7691 of August 17, 1937, as amended by Proclamation No. 2416 of July 25, 1940, is hereby abolished, and the lands now comprising the said refuge are transferred to and consolidated with the Deer Flat National Wildlife Refuge. . . .

The State of Idaho asserts that Public Land Order 3110 abolished the Snake River National Wildlife Refuge entirely, including all purposes for its establishment. The United States correctly characterizes Public Land Order 3110 as "intended only to consolidate management functions, eliminate technical distinctions between the two refuges, and eliminate the confusion between two similarly named refuges. . . ." *United States of America's (Fish and Wildlife Service) Memorandum in Response to State of Idaho's Motion for Summary Judgment and Joint Motion for Summary Judgment (United States' Response)* at 47. This issue is resolved in favor of the United States by application of the rules of judicial interpretation.

In construing an executive order, as with a statute, it is necessary to give effect to the plain meaning of every word in the document, unless doing so would lead to an absurd result. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990). If Public Land Order 3110 entirely abolished the Snake River Wildlife Refuge the language of the order concerning "transferred" and "consolidated" are rendered meaningless and would lead to the absurd result that the two refuges would be merged into a unified whole but for only one-half their original purposes. The literal meaning of consolidate is to "join together into one whole." *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster(1991). Application of the literal language in Public Land Order 3110 leads to the conclusion that the Deer Flat National Wildlife Refuge presently consists of all lands formerly part of the Snake River National Wildlife Refuge and the original Deer Flat National Wildlife Refuge. Similarly the purpose of the contemporary "Deer Flat National Wildlife Refuge" is also the sum of the purposes of the original two reservations. Public Land Order

3110 is a "reclassification" for "administrative purposes" and the only change made by Public Land Order 3110 is the name of the refuge. Therefore, the Deer Flat National Wildlife Refuge remains a valid reservation of land, reserved for the purposes attached to the original reservations.

B. THE DEER FLAT NATIONAL WILDLIFE REFUGE WAS ESTABLISHED BY EXECUTIVE ORDERS WHICH DO NOT GIVE RISE TO EITHER AN EXPRESS OR IMPLIED FEDERAL RESERVED WATER RIGHT.

Since Public Land Order 3110 merely consolidated both the "Snake River National Wildlife Refuge" and the "Deer Flat National Wildlife Refuge" under one name, it is necessary to look at the withdrawals and reservations which originally created the two refuges to determine whether they include federal reserved water rights.

Consistent with prior decisions of this court, the analysis begins with the language of the executive orders. On July 13, 1937, President Roosevelt issued Executive Order 7655 which stated:

By virtue of and pursuant to the authority vested in me as President of the United States and by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, and in order to effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222), it is ordered that all lands owned or controlled by the United States within the following-described area comprising 10,252.76 acres, more or less in Canyon County, Idaho, be, and they are hereby reserved and set apart for the use of the Department of Agriculture, subject to existing valid rights, as a refuge and breeding ground for migratory birds and other wildlife: . . .

Similarly, on August 17, 1937, President Roosevelt issued Executive Order No. 7691 which stated in relevant portions:

[I]n order to effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222), it is ordered that all islands in the Snake River within the exterior limits of the following described area, owned or controlled by the United States, or of which the United States has the use of migratory bird refuge purposes, be, and they are hereby withdrawn from settlement. . . for the use by the Department of Agriculture as a refuge and breeding ground for migratory birds and other wildlife. . . .

By its own unambiguous language, the primary purpose of Executive Order No. 7691 is to reserve islands in the Snake River as a refuge and breeding ground for migratory birds and other wildlife, while Executive Order No. 7655 reserved certain “lands” for the same purpose.

The United States does not allege that either Executive Order 7655 or Executive Order 7691 expressly reserves water. However, the United States claims that use of the word “islands” indicates that a reservation of water must be implied to fulfill the primary purpose of Executive Order 7691 or, in the alternative, that “migratory bird refuge purposes” establishes an implied federal reserved water right.

The United States maintains that the “expressly stated purpose of the President in making [Executive Order 7691 is] so that islands could be permanently maintained as refuges and breeding grounds for migratory birds and other wildlife. . . .” *United States of America's (Fish and Wildlife Service) Memorandum in Support of its Motion for Partial Summary Judgment (United States' Memorandum)* at 20. And further, “it is self evident that a reservation of islands is rendered meaningless and useless if the surrounding water is, or can be removed.” *Id.* at 25. It is the position of the United States that the term “island” mandates the implication of a federal reserved water right to insure that the reserved land remains surrounded by water at all times.

The Objectors explain that Executive Order No. 7691 does not mention any “springs, waterholes or any other water body appurtenant to the reserved lands.” *Objector's Supplemental Brief RE: In Re SRBA Case No. 39376 (Basin Wide Issue No. 9 - PWR 107 Claims), __ Idaho __, 959 P.2d 449 (1998) (Objector's Supplemental Brief)* at 5. Further, Objectors argue that it was merely fortuitous that Executive Order No. 7691 comprised islands because the only land that the United States owned or controlled within the designated area happened to be islands. *Objectors' Memorandum in Support of Motion for Summary Judgment (Objectors' Memorandum in Support)* at 27.

A comparison of the language of Executive Order 7691 with other claims of implied federal reserved water rights granted in the SRBA and adherence to the United States Supreme Court's admonition that a careful examination of claims to an implied federal reserved water right is required

to resolve this issue. The United States Supreme Court set forth a cautious analysis of federal implied reserved water right claims:

[T]he reservation is implied rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to state water law. Where water is necessary to fulfill the very purpose for which a federal reservation is created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.

New Mexico, 483 U.S. at 701-02 (citations omitted). This court has granted two implied reservations of water for federal reservations of land. See Consolidated Subcase No. 75-13605 *Order Granting in Part and Denying in Part United States' Motions for Summary Judgment* (Dec. 17 1997); and Consolidated Subcase No. 65-20766 *Memorandum Decision Granting, in Part, and Denying, in Part, United States Motion for Summary Judgment* (Sept. 13, 1998). Comparing the language of those grants of implied reservations leads this court to conclude that the language in Executive Order No. 7691 does not rise to the level of an implied reservation of water.

This court found implied reservations of water in favor of the United States in the three Idaho Wilderness Areas. See Consolidated Subcase No. 75-13605 *Order Granting in Part and Denying in Part United States' Motions for Summary Judgment* (Dec. 17 1997) (*Order* of Dec. 17, 1997). The Wilderness Areas were established by the Wilderness Act of September 3, 1964, Pub. L. No. 88-577, 78 Stat. 890 (1996) (codified at 16 U.S.C. §§ 1131-36), which reserved large areas of land for the express strict purpose of preserving wilderness character, defined as:

Wilderness in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are **untrammeled by man**, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of **undeveloped** Federal land retaining its primeval character and influence, without **permanent improvements** or human habitation, which is protected and managed so as to preserve its **natural conditions** and which (1) generally appears to have been

affected primarily by the forces of nature, with **imprint of man's work** **substantially** unnoticeable. . . .

U.S.C. 16 § 1131(c) (emphasis added). Congress itself expressed its desire to leave large tracts of land which "retained its primeval character" and "without permanent improvements or human habitation." That water would be required for land to retain its primeval character is plain from the language of the statute. Analyzing the Wilderness Act, it was determined that Congress affirmatively acted within its constitutional authority to set aside large tracts of land to preserve wilderness character. Because the preservation of wilderness character requires a reservation of water, the traditional deference to state control of water resources was superseded by Congressional action.

This court also found an implied federal reservation of water for that portion of the Sawtooth National Recreation Area which was not designated as wilderness area. See Consolidated Subcase No. 65-20766 *Memorandum Decision Granting, in Part, and Denying, in Part, United States Motion for Summary Judgment* (Sept. 15, 1998). Again, Congress affirmatively chose to set aside a large tract of land for sweeping purposes. The Act which established the area was the Sawtooth National Recreation Area Act. Pub. L. No. 92-400, §§ 1-15, 86 Stat. 612 (1972) 16 U.S.C. §§ 460aa-14 (1973). The act established the SNRA to "assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreational values associated therewith." SNRA Act § 1(a). That section was to be read in conjunction with section 2(a) of the SNRA Act which states.

The Secretary shall administer the recreation area in accordance with the laws, rules and regulations applicable to the national forests in such a manner as will best provide (1) the protection and conservation of the salmon and other fisheries; (2) the conservation and development of scenic, natural historic, pastoral, wildlife, and other values, contributing to and available for public recreation and enjoyment, including the preservation of sites associated with and typifying the economic and social history of the American West; and (3) the management, utilization, and disposal of natural resources on federally owned lands such as timber, grazing, and mineral resources insofar as their utilization will not substantially impair the purposes for which the recreation area is established.

16 U.S.C. § 460aa-1(a). The express provisions, particularly those regarding protection of fish, lead to the conclusion that water was implicitly required to fulfill those purposes. Again, the traditional deference to state authority over water resources gave way to clear Congressional action implicitly requiring water. This court premised its decisions in the wilderness areas and the Sawtooth National Recreation Area upon unambiguous congressional statements of primary purposes coupled with the clear requirement of water for their effectuation. The law, therefore, required an implied federal reserved water right for the wilderness areas and the Sawtooth National Recreation Area.

The Deer Flat National Wildlife Refuge was not established by Congress with the same clarity of purpose. While Executive Order No. 7691, which reserves “islands,” conjures up images of water, it is equally as likely that the term “island” was a fortuitous nonlegal description of the land that comprised the reservation. This leads to the conclusion that there was an intention to reserve only those lands, described in shorthand as “islands.” That Executive Order No. 7691 contains a relatively brief description of the exterior boundaries of the area while stating that all islands within those boundaries are reserved supports this interpretation. Similarly, a “refuge” may be established simply by setting these lands apart from the less restrictive laws applying generally to federal lands.

In contrast to Executive Order No. 7691, Executive Order No. 7655 contains a detailed listing of the specific lands reserved and does not refer to “islands.” Executive Order No. 7655 also established a refuge and breeding ground and contains no language that even tangentially refers to water. It does state that a portion of the reservation “shall be subject to the use thereof by the [Interior] Department for reclamation work and incidental purposes.” Without entering the legal morass of defining primary and secondary purposes, it may be concluded that the Deer Flat National Wildlife Refuge was established to serve multiple purposes. The United States correctly explains that the reclamation purposes in Executive Order No. 7655 referenced a project at Lake Lowell. *United States’ Response* at 26. It is also true, though, that the contemporary Deer Flat National Wildlife Refuge is a reservation with many purposes. The multiplicity of purposes severely diminishes the claim that the word “island” in Executive Order No. 7691 requires water to fulfill its

primary purpose. Given the scrutiny which the courts give the implied federal reserved rights doctrine, the United States' position is over broad and fails.

Finally, it is the high level of scrutiny applied to claims for implied federal reserved rights which leads this court to find the Idaho Supreme Court's opinion in *In Re: SRBA Case No. 39765 (Basin Wide Issue-9 PWR 107)*, 131 Idaho 468, 959 P.2d 449 (1998), to be a narrow ruling governed by the limited scope of facts and law highly unique to that case and of little guidance here. The United States' argument that the word "island" in the reserving order necessarily implies a reservation of water because islands are partly defined by water finds support in the Idaho Supreme Court's *PWR 107* decision. Public Water Reserve 107 stated:

[I]t is hereby ordered that every smallest legal subdivision of land surveys which is vacant, unappropriated, unreserved public land and contains a spring or waterhole, and all land within one quarter of a mile of every spring or waterhole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

In the *PWR 107* decision, the Idaho Supreme Court found "an express intention by Congress that reserves a water right in the United States" within the "plain ordinary words of the enabling statutes and executive order." *Id.* at 471. Executive Order 7691 sets out the inverse of *PWR 107* in that *PWR 107* land contained waterholes (i.e. water surrounded by land), while the "islands" reserved by Executive Order No. 7691 are land areas presumably surrounded by water. In either case, the land that is reserved is partially defined, legally and geographically, by its proximity to water. This court ruled in *PWR 107* that fortuitous references to water, necessary to define the **land** to be reserved, were insufficient to merit a federal reserved water right and did not lead to the conclusion that water was necessary to fulfill the purposes of *PWR 107*. However, in reversing and holding *PWR 107* to be an "express reservation," the Idaho Supreme Court looked beyond the language of the reserving document to the enabling statutes authorizing the reservation. Inexplicably, the court applied the test for implied reservations while simultaneously holding *PWR 107* to be an "express" reservation. For the purposes of deciding these cross motions for summary judgment, this court can only conclude

that the Supreme Court's application of the implied reserved water right doctrine, results in PWR 107 being an implied reserved water right. Therefore, the decision in PWR 107 has little application here, except to support reviewing the United States' claims using the traditional test for implied federal reserved water rights.

The primary purpose of the Deer Flat Wildlife Refuge is that which is stated in Executive Order No. 7691, to reserve the "islands" as a "sanctuary for migratory birds." In summary, neither Executive Order No. 7691 nor Executive Order No. 7655 provide the clear expression of purpose upon which this court could, as it has in the past, rule that without water the reservation of the Deer Flat National Wildlife Refuge would be entirely defeated.

C. THERE IS NO AUTHORIZING OR ENABLING LEGISLATION FOR THE DEER FLAT NATIONAL WILDLIFE REFUGE WHICH IMPLICITLY REQUIRES A RESERVATION OF WATER.

The Idaho Supreme Court followed the test in *New Mexico* and looked to the authorizing and enabling statutes as well as the reserving order to find an implied reservation for PWR 107; and therefore, the enabling or authorizing legislation of Executive Order No. 7691 must be analyzed. Executive Order No. 7691 was authorized by the Pickett Act, 43 U.S.C. § 141, which states:

[T]he President, may at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

By its own terms, the Pickett Act authorizes the reservation of lands for purposes which may require a reservation of water. However, there is no language in the Pickett Act which implies that a reservation of water is necessary to fulfill the purposes of the Deer Flat National Wildlife Refuge or any other reservation which it might authorize. Without more, it cannot be stated with certainty that the purposes of the Pickett Act and the Deer Flat National Wildlife Refuge would be entirely defeated without a reservation of water.

Objectors further argued that the purposes of the Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.*, evidenced that water was not required to fulfill the purposes of the Deer Flat National Wildlife Refuge. However, the United States properly admitted that the Migratory Bird Conservation Act was not authorizing legislation and, therefore, the purposes of that act are not relevant and cannot be considered in this analysis.

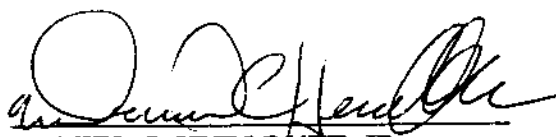
IV. CONCLUSION

The United States has not claimed an express reservation of water for the Deer Flat National Wildlife Refuge. A federal reserved water right may only be implied if absolutely necessary to fulfill the primary purposes of the reservation. Unlike other implied reserved water rights granted by this court, the purposes of the Deer Flat Wildlife Refuge do not clearly necessitate water to be fulfilled. There is no enabling or authorizing legislation for the Deer Flat National Wildlife Refuge which requires water. Therefore, there is no legal basis upon which an implied federal reserved right may be based.

The State of Idaho's and the Objectors' *Motion for Summary Judgment* is GRANTED and the United States' claims for an implied reserved water right in consolidated subcase 02-10063 are DISMISSED.

IT IS SO ORDERED.

DATED December 31, 1998.



DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication